INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of Argument	6
Argument	9
I. Section 243 (h) applies to expelled, not excluded, aliens	12
A. The context of Section 243 (h) shows that the section applies only to expulsion and not to exclusion cases	12
B. The legislative history of Section 243 (h) shows that it applies only to expulsion of resident aliens	14
C. Neither detention in custody nor enlargement on parole makes an excluded alien a person "within the United States" in the sense of Section 243 (h)	19
II. An application under Section 243 (h) does not present the question of the right of an excluded alien to continuation of parole. Parole, in any event, is an exclusively executive matter	26
Conclusion	28

CITATIONS

Cases:

Dong Wing Ott v. *Shaughnessy*, 245 F. 2d 875, 247 F. 2d 769, petition for certiorari pending, No. 655, this Term 13

Fong Yue Ting v. *United States*, 149 U. S. 698 27

Galvan v. *Press*, 347 U. S. 522 27

Harisiades v. *Shaughnessy*, 342 U. S. 580 27

Jew Sing v. *Barber*, 215 F. 2d 906, certiorari granted, 348 U. S. 910, vacated for mootness, 350 U. S. 898 24

Cases—Continued Page

Kaplan v. *Tod*, 267 U. S. 228 ..... 8, 10, 21
Knauff, United States ex rel. v. *Shaughnessy*, 338 U. S. 537 ..... 10, 11, 12
Kwong Hai Chew v. *Colding*, 344 U. S. 590 12
Lue Chow Yee, United States ex rel. v. *Shaughnessy*, 245 F. 2d 874 24
Ng Lin Chong v. *McGrath*, 202 F. 2d 316 ..... 24, 25
Nishimura Ekiu v. *United States*, 142 U. S. 651 ..... 10, 22
Quan v. *Brownell*, 248 F. 2d 89, No. 396, this term 22
Shaughnessy v. *United States ex rel. Mezei*, 345 U. S. 206 ..... 12, 21, 27
United States v. *Ju Toy*, 198 U. S. 253 ..... 10, 21

Statutes:

Immigration Act of 1917, 39 Stat. 874, as amended, 8 U. S. C. (1946 ed.) 132, *et seq.*:
Section 15 (8 U. S. C. 151) 10
Section 18 (8 U. S. C. 154) 3, 8, 9, 18, 24, 25
Section 20 (8 U. S. C. (1946 ed., Supp. V) 156 (a)) 18, 24
Immigration Act of 1952, Section 233, 8 U. S. C. 1223 10
Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, *et seq.*:
Section 212 (a) (8 U. S. C. 1182 (a)) 13
Section 212 (d) (8 U. S. C. 1182 (d)) 3, 5, 8, 9, 10, 20, 22, 25, 26, 28
Section 233 (8 U. S. C. 1223) 10
Section 236 (8 U. S. C. 1226) 13
Section 237 (a) (8 U. S. C. 1227 (a)) 2, 6, 8, 9, 14, 18, 26
Section 237 (d) (8 U. S. C. 1227 (d)) 14
Section 241 (8 U. S. C. 1251) 13, 14
Section 242 (8 U. S. C. 1252 (b)) 13, 14
Sections 242–244 (8 U. S. C. 1252–1254) 14
Section 243 (h) (8 U. S. C. 1253 (h)) 2, 10, 11, 12, 14, 15, 18, 19, 22, 25, 26, 27, 28
Section 244 (8 U. S. C. 1254) 14
Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ..... 16, 17
Rev. Stat. 2172 21

Miscellaneous:

	Page
96 Cong. Rec. 10452	15
96 Cong. Rec. 10460	15
96 Cong. Rec. 11724	15
96 Cong. Rec. 14170	16
96 Cong. Rec. 15282–15283	16
96 Cong. Rec. 15632, 15726	16
Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 81st Cong., 1st Sess., on H. R. 10, pp. 3–5	14
H. R. 9490	16
H. Conf. Rep. 3112, 81st Cong., 2d Sess	16
H. Rep. 1192, 81st Cong., 1st Sess., pp. 8, 9, 17, 18	15
H. Rep. 1365, 82d Cong., 2d Sess., on H. R. 5678, p. 52	20
S. 4037, 81st Cong., 2d Sess	15, 16
S. Rep. 2239, 81st Cong., 2d Sess., pp. 4, 10	15
S. Rep. 2369, 81st Cong., 2d Sess., pp. 14–15	15

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA, PETITIONER

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 13–15) is reported at 241 F. 2d 85.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957 (R. 15). The petition for a writ of certiorari was filed on April 17, 1957, and was granted on June 3, 1957 (R. 16). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, an excluded alien who has failed to establish her claim of a right to enter the United States, and who was admitted into the country on parole only during the pendency of the exclusion proceedings, is entitled to have an application for a stay of deportation entertained under Section 243 (h) of the Immigration and Nationality Act of 1952 on the ground that, if deported, she would be subject to physical persecution.

STATUTES INVOLVED

Section 243 (h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, 8 U. S. C. 1253 (h), provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237 (a) of the same Act provides in relevant part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came, in accomodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212 (d) of the same Act provides in relevant part:

* * * * *

> (5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* * * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U. S. C. (1946 ed.) 154, provides in relevant part:

> All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. * * *

STATEMENT

Petitioner is a native of China who claimed to have acquired United States citizenship at birth on the

basis that her father was a United States citizen. Upon her arrival in this country on May 4, 1951, and subsequent thereto, she was accorded hearings on her claim by the Immigration and Naturalization Service. She was released under bond on August 11, 1952.

On November 19, 1952, a Board of Special Inquiry found that she had failed to establish her identity as a United States national and ordered her excluded. Her appeal to the Board of Immigration Appeals was dismissed on December 11, 1953. On January 5, 1954, she was notified to surrender herself for deportation to China. She then applied for a stay of deportation under the provisions of Section 243 (h) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1253 (h)), alleging that deportation would subject her to physical persecution and probable death. She was advised by the Immigration and Naturalization Service that, since she was excluded from admission to the United States, she was not eligible for the relief afforded by Section 243 (h).

She thereupon filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California claiming that denial of relief under Section 243 (h) was a violation of due process and an abuse of discretion, and that her contemplated deportation was contrary to law and constituted unusual and inhumane punishment (R. 3–6).

The petition for habeas corpus was denied by the District Court on the ground that it did not state

facts sufficient to warrant the writ (R. 8). On appeal, the judgment was affirmed (R. 15), the Court of Appeals holding that petitioner was not an alien "within the United States" who might seek a stay of deportation under Section 243 (h).

In her brief to this Court, following the grant of certiorari, petitioner raised, for the first time, the question of the power of the Attorney General to continue her parole in this country under Section 212 (d) (5) of the 1952 Act (Pet. Br. 21-23). The Government was of the opinion that, although this question was not one properly before the Court in this case, Section 212 (d) (5) was in fact broad enough to permit the Attorney General to entertain a request by an excluded alien like respondent for further parole and to grant relief to such an alien, provided that the Attorney General concluded that the continuation of parole was justified by "emergent reasons or * * * reasons deemed strictly in the public interest" (*supra*, p. 3). After consultation with petitioner's counsel, the Solicitor General, in a motion filed with the Court, suggested that the briefing of this case be held in abeyance so that petitioner might request relief under Section 212 (d) (5) and that the case might remain *in statu quo* pending completion of the administrative proceeding in contemplation.[1] The Court granted the motion on January 13, 1958. Thereafter, on January 17, 1958, petitioner requested continuation of parole. On February 13, 1958, the District Director, Immi-

[1] The motion pointed out that grant of relief under Section 212 (d) (5) would cause the case to become moot.

gration and Naturalization Service, San Francisco, stating that he had considered all aspects of the case, including the allegation of physical persecution, denied the request.[2]

SUMMARY OF ARGUMENT

I

Petitioner, who does not question the validity of the finding that she is ineligible to enter this country, is an excluded alien. As such, she is subject to removal to the country whence she came, under both Section 18 of the Immigration Act of 1917 and Section 237 (a) of the Immigration and Nationality Act of 1952. The statute, as well as judicial precedents, establishes that neither her removal from the ship nor her enlargement on parole while she sought to prove her eligibility to enter this country makes her anything other than an excluded alien. As an excluded alien, she is not an alien "within the United States" entitled to have an application for a stay of deportation entertained under Section 243 (h) of the Act of 1952. The issue here is one of statutory construction. Congress did not intend, we submit, that this section be applicable to an alien seeking admission to the United States who has been denied permission to enter.

A. The context of Section 243 (h) in the 1952 statute shows that it applies only to aliens ordered expelled, not to aliens ordered excluded. Although the

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[2] This determination was made on the basis of the existing record on file with the Immigration and Naturalization Service, together with the additional papers filed by the alien in support of her request for continuation of parole.

word "deportation" is used generally to denote any physical transportation of an alien out of the country, there is a clear and settled legal distinction between removal of an alien who has never been allowed to enter, and removal, after arrest and apprehension, of an alien found within the United States. The language, structure and organization of the 1952 Act fully preserve this distinction. The Act sets up separate grounds for exclusion, which are distinct from those for expulsion; it establishes separate administrative procedures for determining these grounds, separate provisions for transportation out of the country where such grounds are found to exist, and separate provisions for a stay or suspension of such transportation. Provisions relating to exclusion appear in Chapters 2 and 4. Chapter 5 deals exclusively with expulsion. Section 243 (h) appears in Chapter 5.

B. The legislative history of Section 243 (h) shows that it applies only to expulsion of resident aliens. The provision had its genesis in security measures—bills introduced in the 81st Congress to facilitate the removal of a large number of aliens in this country who had been ordered deported but who were still at large. Because there was some concern that enforcement of the suggested deportation controls might, in certain cases, make the deportation of an alien resident a death sentence, the proviso that no alien should be deported to a country where, in the opinion of the Attorney General, he would suffer physical persecution was appended to the legislation. The proviso became law by virtue of the Internal Security Act

of 1950, which amended Section 20 of the 1917 Act, the Section containing the expulsion provisions of the prior immigration law. Section 18 of the 1917 Act, providing for immediate removal of aliens ordered *excluded*, remained unaffected by the Internal Security Act.

In the 1952 Act, Congress changed the wording of the proviso, describing the alien entitled to relief thereunder as one "within the United States." It is thus clear that the proviso, even when read apart from its context, applies only to aliens found in the United States and ordered deported after apprehension.

C. The fact that an excluded alien has been detained in custody or enlarged on parole while seeking to establish a right to enter this country does not bring such an alien "within the United States" in the meaning of Section 243 (h). The 1952 Act expressly provides that parole shall *not* be regarded as an admission of an alien, and that after the purposes of the parole have been served the alien must be returned to custody and dealt with as any other applicant for admission. Section 212 (d) (5). Years before this explicit legislation, this Court settled that mere physical presence here, at the boundary or on parole, does not bring an excludee legally within the country. *Kaplan* v. *Tod*, 267 U. S. 228.

II

The purposes of petitioner's enlargement on parole having been served, Section 212 (d) (5) of the 1952 Act requires that she be subjected to immediate deportation under Section 237 (a) of the Act. Her

brief to this Court raised, for the first time, the question of the discretionary power of the Attorney General to continue her parole. The Immigration and Naturalization Service (as the delegate of the Attorney General) has since considered a request for continuation of parole, submitted during the pendency of the case in this Court. The Service has not deemed further parole justified by "emergent reasons" or reasons "strictly in the public interest" (Section 212 (d) (5)). Any possible issue as to the reviewability of this denial of continuation of parole (which we believe to be a political and discretionary determination not subject to review at all) is outside the present case. The sole issue before this Court is the issue raised and decided below—whether the Attorney General was obliged to entertain the application of petitioner, an excluded alien, under Section 243 (h).

ARGUMENT

Petitioner does not challenge the validity of the order excluding her, nor the proceedings culminating in that order. Her status as an alien applying for admission who has been found ineligible to enter must thus be taken as established. As an excluded alien, she would have been subject, at the time she attempted to enter in 1951, to Section 18 of the Immigration Act of 1917, as amended (8 U. S. C. (1946 ed.) 154), providing that she should be returned to the country whence she came. She is in the same position under Section 237 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1227 (a)), whic

also provides for the return of excluded aliens. Her removal from the vessel in which she arrived, for the purpose of inquiry into her right to be admitted, did not change her status as an excluded alien; she remained subject to return to the country from which she came, both under the former statute (Section 15 of the Immigration Act of 1917, 8 U. S. C. (1946 ed.) 151) and under the 1952 Act (Section 233, 8 U. S. C. 1223). *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

Nor did petitioner's enlargement on parole, in order to give her an opportunity to prove her eligibility to enter, change her status. Section 212 (d) of the 1952 Act (8 U. S. C. 1182 (d) (5)) specifically provides that parole of an alien applying for admission "shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." See, also, *Kaplan* v. *Tod*, 267 U. S. 228.

Petitioner contends, nevertheless, that under Section 243 (h) of the 1952 Act, she is an alien "within the United States" who is entitled to have her application for a stay of deportation entertained on her claim that she would be subject to physical persecu-

tion if returned to the country whence she came. That section, *supra*, p. 2, provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Petitioner argues that the section applies to her because she has been physically within the United States. It is the government's position, on the other hand, that Section 243 (h) applies only to aliens who, in contemplation of law, were within the country; that it does not apply to an excluded alien—one who, in contemplation of law, has been stopped at the border and not allowed to come in; and that petitioner's physical presence here, under detention or parole, does not change her status from that of an excluded alien.

The question is not one of Communist ideology (Pet. 11), of humanitarian principles (Pet. 16), or of Immigration and Naturalization Service policy (Pet. 17). The problem is wholly one of statutory construction. Since no alien, not even a lawfully admitted resident alien, has a constitutional right to remain in the United States,[3] it necessarily follows that any act withholding deportation is an act of Congressional grace, to be applied on such terms as Congress has prescribed. As we show *infra*, the provision for withholding deportation on grounds of

[3] See, *e. g.*, *Knauff* v. *Shaughnessy*, 338 U. S. 537.

physical persecution is of fairly recent origin. This in itself indicates that the Section is not part of any long-established, well-recognized right of an alien, resident or non-resident. Clearly, an alien seeking admission—a person who does not have the constitutional protections accorded a resident alien[4]—cannot, as a matter of right, claim the relief here sought. The only question in this case, therefore, is whether Congress intended the provisions of Section 243 (h) to apply to one in the status of petitioner, *i. e.*, an alien seeking admission to the United States who has been denied permission to enter. We think it is plain that Congress did not so intend.

I

SECTION 243 (h) APPLIES TO EXPELLED, NOT EXCLUDED, ALIENS

A. The context of Section 243 (h) shows that the section applies only to expulsion and not to exclusion cases

Although the word "deportation" is used generally to denote any physical transportation of an alien out of the country, there is a clear legal distinction between exclusion and removal of an alien whose application for admission is denied, and expulsion and deportation, after apprehension and arrest, of an alien found within the United States. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; *Knauff* v. *Shaughnessy*, 338 U. S. 537. As this Court said in *Shaughnessy* v. *Mezei*, 345 U. S. 206, 212:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to

[4] *Shaughnessy* v. *Mezei*, 345 U. S. 206; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

> traditional standards of fairness encompassed in due process of law * * *. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

The practical and historical distinction between exclusion and expulsion is clearly delineated in the Immigration and Nationality Act of 1952. See *Dong Wing Ott* v. *Shaughnessy*, 245 F. 2d 875, 247 F. 2d 769 (C. A. 2), petition for certiorari pending, No. 655, this Term. Whenever the word "deported" is used in the statute in connection with exclusion, it appears in a context which preserves the distinction between its use in the colloquial sense of transportation out of the country, and its use in the legal and technical sense of expulsion. See, *e. g.*, Section 212 (a) (16), referring to "Aliens who have been excluded from admission and deported * * *." The whole structure of the Act shows that the different consequences of exclusion and expulsion were recognized by Congress. Provisions relating to exclusion appear in Chapters 2 and 4. Chapter 5 deals exclusively with expulsion. The Act enumerates grounds for exclusion which are distinct from those for expulsion (cf. Section 212 (8 U. S. C. 1182) with Section 241 (8 U. S. C. 1251)). Separate administrative processes are established for purposes of determining whether grounds exist for exclusion (Section 236 (8 U. S. C. 1226)) as opposed to expulsion (Section 242 (8 U. S. C. 1252 (b))). Excluded aliens and expelled aliens are subject to separate provisions relative to removal and transpor-

tation (cf. Section 237 (8 U. S. C. 1227) with Sections 242–244 (8 U. S. C. 1252–1254)), and to separate provisos relative to the grant of a stay or suspension (cf. Section 237 (d) (8 U. S. C. 1227 (d) with Sections 243 (h), 244 (8 U. S. C. 1253 (h), 1254)). Section 243 (h), here in question, appears in the chapter on expulsion. It is the last subdivision of a section which provides for "countries to which aliens shall be deported", a section which, as we show *infra*, pp. 15–18, was obviously not intended as a directive applicable to excluded aliens. It is preceded by sections spelling out the classes of resident aliens subject to expulsion and deportation (Section 241) and the administrative process by which deportability, in the sense of expulsion, is to be determined (Section 242). It is followed by a section providing for suspension of deportation and voluntary departure (Section 244). Thus, the context of Section 243 (h) in itself establishes that the provision for withholding deportation was intended to apply only to expulsion proceedings, not to exclusion cases.

B. The legislative history of Section 243 (h) shows that it applies only to expulsion of resident aliens

Section 243 (h) had its genesis in H. R. 10, the so-called Hobbs bill, introduced in the 81st Congress because of the concern with this country's inability to execute outstanding warrants of deportation against aliens at large in the country.* Despite de-

* It was estimated that at the time there were 4,000 aliens in the country against whom final orders of deportation had been issued without avail. See Hearings before Subcommittee No. 1

bate in the House pointing out that the bill might make deportation of an alien resident a death sentence,[6] it passed that body devoid of any reference to physical persecution. It was reported favorably in the Senate where, for the first time, the following provision was added:

> No alien shall be deported under any provision of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution.[7]

Thereafter, the principal provisions of H. R. 10, including the above prohibition, were incorporated (as Section 23) into S. 4037, an omnibus bill consolidating various bills proposed in the interest of internal security. The Majority Report of the Senate Committee on the Judiciary had this to say of Section 23 of S. 4037 (S. Rep. 2369, 81st Cong., 2nd Sess., pp. 14–15):[8]

> The purpose of section 23 is to amend existing laws relating to the *deportation of aliens* so that there may be more effective control over

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of the Committee on the Judiciary, House of Representatives, 81st Cong., 1st Sess., on H. R. 10, May 20, 1949, pp. 3–5. It was brought out that some of the more undesirable aliens had been in the country under final order of deportation for as long as 18 to 21 years. See H. Rep. 1192, 81st Cong., 1st Sess., pp. 8, 9.

[6] 96 Cong. Rec. 10452. See, also, Minority Views, H. Rep. 1192, 81st Cong., 1st Sess., pp. 17, 18.

[7] July 17, 1950, 96 Cong. Rec. 10460.

[8] S. Rep. 2239, 81st Cong., 2nd Sess., pp. 4, 10; 96 Cong. Rec. 11724. This language remained unchanged through various incorporations and revisions until the passage of the Immigration and Nationality Act of 1952, when it was superseded by the present language of Section 243 (h). See *infra*, p. 2.

deportable aliens who cannot be deported for reasons *beyond the control of the United States*. The major provisions are as follows:

1. The authority of the Attorney General to determine the country to which an alien *unlawfully in the United States* is to be deported is enlarged.

2. The procedure to be followed and the control to be exercised by the Attorney General in dealing with aliens *illegally in the United States* is specified, and criminal penalties for violation of the terms of supervision of deportable aliens are provided.

3. Criminal penalties for deportable aliens in the criminal, subversive, and immoral classes who willfully fail *to depart from the United States* are provided, but the courts, under certain conditions, are vested with power to release such aliens from confinement. [Emphasis added.][9]

H. R. 9490 was substituted for S. 4037, but Section 23 remained the same. The House bill became law as the Internal Security Act of 1950, 96 Cong. Rec. 15632, 15726. The conference report to the House (No. 3112, 81st Cong., 2d Sess.; 96 Cong Rec. 15282–15283) stated:

Section 23 of the conference substitute amends section 20 of the Immigration Act of February 5, 1917, as amended (8 U. S. C. 156), in order to provide more effective con-

[9] Debates on the floor of the Senate (96 Cong. Rec. 14170, *et seq.*) similarly show that the deportation referred to was that of deportation in the sense of expulsion.

trol over, *and to facilitate the deportation of, deportable aliens.*

* * * * *

The first sentence of such subsection (a) broadens the authority of the Attorney General under existing law to determine the country to which an alien *unlawfully in the United States* may be deported. The existing first sentence of section 20, which listed the countries to which an alien may be deported, is restrictive in scope. The new first sentence of subsection (a) provides that an alien may be deported to the country specified by the alien if such country is willing to accept him into its territory. In addition, it gives the Attorney General more latitude in *effecting the deportation of a deportable alien* (1) by enlarging the list of countries and places to which such alien may be deported if the country specified by such alien is unwilling to accept him into its territory or if he does not specify any country, and (2) by permitting the Attorney General to select the country or place to which such alien may be deported, within his discretion and without priority of preference because of the order in which such countries and places are set forth in the new sentence. It is further provided that no alien shall be deported to any country in which the Attorney General finds that such alien would be subjected to physical persecution. [Emphasis added.]

It is clear from this documentation that the 1950 act was aimed at deportable resident aliens, and that there was no thought that the section would apply to excluded persons. Congress was acting in the inter-

est of internal security to rid the country of undesirable aliens within its borders, and the prohibition against deportation of an alien to a country where he might be subject to physical persecution was an exception considered solely applicable with regard to such expulsion. The provision of Section 18 of the Act of 1917 (now Section 237 (a)), that *excluded* aliens be immediately sent back to the country from whence they came, remained unaffected by the Internal Security Act of 1950.

This conclusion that Congress intended that only deportable aliens might apply for a stay on grounds of persecution is further buttressed by subsequent changes in the language of this provision. While Section 20 of the Act of 1917 (as amended, 8 U. S. C. (1946 ed., Supp. V) 156 (a)) referred to deportation "under any provisions of this chapter",[10] Section 243 (h) of the 1952 Act makes it clear that the deportation which the Attorney General is authorized to withhold is that of "any alien within the United States." Subsection (a) of the same section likewise refers to the deportation of an "alien in the United States."

There are obvious reasons why Congress would make the provision for withholding of deportation on the ground of persecution applicable only to deportation, not exclusion. Deportation may apply to aliens who have resided in the United States for many years. It is one thing for Congress to recognize a

[10] "This chapter" at that time was "Chapter 6—Immigration." The original of this subsection read "Act", referring to the Immigration Act of 1917.

responsibility to such aliens not to send them to a place where they will suffer persecution; it is quite another for Congress to assume a similar responsibility toward aliens who have not been within the protection of the United States and merely seek to enter from a foreign country. If a claim of danger of persecution in the country from which he came would give an alien a right to remain in the care of the United States, even though not technically an entrant, the result could well be, as a practical matter, a flood of physical entries by persons who would otherwise be inadmissible.

C. Neither detention in custody nor enlargement on parole makes an excluded alien a person "within the United States" in the sense of Section 243 (h)

Petitioner argues that the fact that she has been here physically for over two and a half years differentiates her situation from that of the ordinary excluded alien and brings her within the purview of Section 243 (h). The statute and a settled course of decision lead to the contrary conclusion.

Petitioner was permitted to remain here on sufferance, for her own benefit. Although she was detained in custody for some fifteen months and enlarged under parole for some seventeen additional months, this was merely to give her an opportunity to prove, if she could, her eligibility to enter. Almost immediately after the final administrative decision holding her ineligible to enter, she was ordered to surrender for deportation. She is an alien who has been excluded—not allowed to come in. Her physical presence here during the pendency of the determination cannot

transform her status in any respect. In legal contemplation, she is not within the United States.

This conclusion is dictated by the 1952 Act. Section 212 (d) of that Act provides:

> (5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled *and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.* [Emphasis added.] [11]

Congress thus made it clear beyond doubt that the parole of an alien applying for admission does not entitle him to special treatment.

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[11] With regard to this section, H. Rep. 1365, 82d Cong., 2d Sess., on H. R. 5678, states (p. 52):

"* * * The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The committee believes that the broader discretionary authority is necessary to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution."

Even before this explicit 1952 legislation, this Court had held, in *Kaplan* v. *Tod*, 267 U. S. 228, that parole did not place an excludee within the country. In that case, a feeble-minded child, released on parole into the care of a social agency, was claimed to have acquired nationality by the naturalization of her father while she was physically in the United States, under a statute granting naturalization to children "if dwelling in the United States." Rev. Stat. 2172. This Court, speaking through Justice Holmes, said of that contention, 267 U. S. at 230:

> * * * The appellant could not lawfully have landed in the United States in view of the express prohibition of the Act of 1910 just referred to, and until she legally landed "could not have dwelt within the United States." *Zartarian* v. *Billings*, 204 U. S. 170, 175. Moreover while she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. *United States* v. *Ju Toy*, 198 U. S. 253, 263. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States. * * *

See, also, *Shaughnessy* v. *Mezei*, 345 U. S. 206, 213.

Decisions of long standing have settled the principle that mere physical presence within the boundaries of this country does not change the status of an alien applying for admission. *United States* v. *Ju Toy*, 198

U. S. 253; *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

The cases arising in the District of Columbia Circuit, upon which petitioner relies, cannot be squared, we submit, with the statute or with this Court's rulings. In *Quan* v. *Brownell*, to be argued immediately after this case (No. 396), the Court of Appeals for the District of Columbia Circuit held that an alien paroled into the United States under Section 212 (d) (5) of the 1952 Act is "within the United States" in the meaning of Section 243 (h). 248 F. 2d 89. It reasoned that, since the word "deportation" is used in the provisions relating to exclusion, there is no significant difference between "exclusion" and "expulsion" cases. The fallacy of this is pointed out by the Court of Appeals for the Second Circuit in *Dong Wing Ott* v. *Shaughnessy*, 245 F. 2d 875, 247 F. 2d 769 (C. A. 2), petition for certiorari pending, No. 655, this Term, in which the opinion on rehearing comments on the intervening *Quan* decision as follows (247 F. 2d at 770):

> We think our brothers of the District of Columbia have overlooked the continuing vitality of *Kaplan* v. *Tod*, 267 U. S. 228, and cases following it. There it was held that an alien who had been ordered excluded at the time of his attempted entry, but who was released into the United States on parole pending legal proceedings, did not have his status as an excludee affected and the parole did not place him "within the United States" as that phrase is used in the immigration statutes. This distinction between exclusion from entry into the United States because of legal inadmissibility and expulsion

under an order of deportation after entry is carefully preserved in the Immigration and Nationality Act of 1952, where Part IV, 8 U. S. C. §§ 1221–1230, contains "Provisions Relating to Entry and Exclusion", while Part V, 8 U. S. C. §§ 1251–1260, deals with "Deportation; Adjustment of Status." Examination of these respective statutes shows a careful differentiation of procedure, see, *e. g.*, 8 U. S. C. § 1226, "Exclusion of aliens—Proceedings," as compared with 8 U. S. C. § 1252, "Apprehension and deportation of aliens—Arrest and custody; review of determination by court."

The provision here in issue giving the Attorney-General certain discretionary power to suspend deportation is found only in Part V, 8 U. S. C. § 1253 (h); and in the 1952 revision Congress deliberately inserted the words "within the United States" in the earlier act (former 8 U. S. C. § 156, as amended in 1950) as though to make clear that it did not apply to excluded aliens. Hence it did not apply to these plaintiffs, only within the country on parole, which by statute "shall not be regarded as an admission of the alien" and when terminated shall leave their case "to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U. S. C. § 1182 (d) (5). We do not regard this precise statutory scheme as destroyed or limited by the occasional use of "deportation" in its more colloquial sense, *e. g.*, 8 U. S. C. § 1226 (a), "shall be excluded and deported," or 8 U. S. C. § 1227 (a), providing for the immediate "deportation of aliens excluded from admission or entering in violation of law." The word so

used serves an obviously different function than in the Part V statutes dealing with deportation in its legal and technical sense.[12]

We believe that the Court of Appeals for the District of Columbia Circuit also erred in its decision in *Ng Lin Chong* v. *McGrath*, 202 F. 2d 316, although that case is distinguishable on its facts from the present one. There, the court held that, where the government had chosen to delay the deportation of an alien subject to immediate rejection for the purpose of prosecuting him, it could not thereafter proceed to enforce his departure under Section 18 of the 1917 Act (dealing with exclusion), but must resort to procedures outlined in Section 20, as amended, regulating deportation in the sense of expulsion. The decision was a narrow one[13] based on the fact that, because the appellants were not "immediately sent back * * *" as contemplated by Section 18, no alternative procedure was available to the Attorney General under the earlier statute (202 F. 2d at 319–320). In the instant case, petitioner's deportation was not delayed by the Attorney General; her detention and parole were accorded solely to give her an opportunity to prove her right to enter, and she was notified to

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[12] See, also, *United States ex rel. Lue Choie Yee* v. *Shaughnessy*, 245 F. 2d 874 (C. A. 2); *Jew Sing* v. *Barber*, 215 F. 2d 906 (C. A. 9), certiorari granted, 348 U. S. 910, vacated for mootness, 350 U. S. 898.

[13] The court found it unnecessary to resolve the question whether aliens subjected to immediate deportation within the meaning of Section 18 would be entitled to the protection of Section 20, as amended. (202 F. 2d at 319, note 21).

surrender for immediate rejection when she failed to do so.[14] If the *Ng Lin Chong* decision can be justified at all, it is only on the basis of ambiguities in the prior statute under which it arose—ambiguities certainly erased by the 1952 Act. As pointed out above (p. 18), Section 243 (h) contains the phrase "within the United States," which did not appear in the prior statute. The earlier provision referred to deportation "under any provisions of this *chapter*" (emphasis added); and the chapter included exclusion provisions as well as those pertaining to deportation proper. Section 243 (h) of the 1952 Act refers merely to "deportation" and, as discussed *supra* (pp. 12–14), is placed in such a context that it can properly be understood as referring only to deportation of aliens who are technically as well as physically "within the United States". And finally, the provisions of Section 212 (d) (5) of the 1952 Act (pp. 3, 20, *supra*) make it explicit that one paroled by the Attorney General is not to be treated as other than an applicant for admission. In view of the legislative history of Section 18 of the 1917 Act, set forth above (pp. 14–18), we think the *Ng Lin Chong* decision incorrect, even under the prior statute. But, in any event, its reasoning is not applicable here.

Petitioner, in sum, is seeking a privilege granted by a statute which does not apply to one in her status. Having been found ineligible to enter, the purpose for which her parole was granted has been served, and

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[14] Petitioner had no prior residence in this country, as did the aliens in *Ng Lin Chong*.

Section 212 (d) (5) requires that she be immediately deported in accordance with the provisions of Section 237 (a).

II

AN APPLICATION UNDER SECTION 243 (h) DOES NOT PRESENT THE QUESTION OF THE RIGHT OF AN EXCLUDED ALIEN TO CONTINUATION OF PAROLE. PAROLE, IN ANY EVENT, IS AN EXCLUSIVELY EXECUTIVE MATTER.

Petitioner argues for the first time in this Court that the Attorney General has the power to exercise his discretion to continue her parole under Section 212 (d) (5) of the 1952 Act. Although this question was not, and is not now, before this Court, the government procured a delay in the present proceedings to permit petitioner to request further parole, recognizing that Section 212 (d) (5) was broad enough, in appropriate circumstances and in the discretion of the Attorney General, to permit parole of an excluded alien "for emergent reasons or for reasons deemed strictly in the public interest",[15] and that a claim of danger of physical persecution would be a relevant factor under that standard. Immediate consideration was given to petitioner's request and the Immigration and Naturalization Service (as the delegate of the Attorney General) has concluded that parole should be denied. We are advised by the Service that the request was denied because, among other reasons, the petitioner failed to establish, in the view of the Service, that she would be subject to physical persecution if removed to Communist China.

[15] The Attorney General is also given the power under Section 237 (a) of the 1952 Act to detain an alien, after an exclusion order has issued, when he considers it "practicable or proper".

The decision of the Attorney General, in the exercise of his discretion to grant or withhold parole into the United States, falls within the category of political determinations wholly entrusted to the executive branch of the government. Because of the international and diplomatic factors and the type of discretion involved, such a determination, we believe, may not be the subject of judicial review or inquiry. Cf. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–590; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 210; *Galvan* v. *Press*, 347 U. S. 522, 531.

Moreover, that issue is not now here. Petitioner's application which gave rise to the present proceeding was a petition "in accordance with the provisions of 8 C. F. R. 243.3 (h)," asking for a stay of deportation on the ground that she would be subject, if deported, to physical persecution (R. 5). This application was denied by the Service because she was "not eligible for the relief afforded by Section 243 (h)" (R. 7). Her complaint, alleging abuse of discretion and denial of due process of law, was based solely on this action of the Service denying the 243 (h) application (R. 5–6). Thus, the sole issue before this Court is whether she is an alien "within the United States" who is entitled to have an application for a stay of deportation entertained under Section 243 (h). For the reasons hitherto discussed, the Attorney General has no power to grant relief under Section 243 (h) to an excluded alien.

The only power which the Attorney General has with respect to a claim of physical persecution by excluded aliens stems from 212 (d) (5), and not from 243 (h). The sections are distinct as to applicability. Section 212 (d) (5) occurs in Chapter 2 dealing mainly with admission qualifications for aliens; Section 243 (h), as noted above (p. 14), appears in Chapter 5, dealing exclusively with expelled aliens. The standards which the Attorney General is to apply in a determination under each section are distinct. While the danger of physical persecution of an individual is a factor to be considered in determining whether his detention and parole would be justified for "emergent reasons" or "reasons deemed strictly in the public interest", it is obviously only one factor to be weighed in conjunction with other considerations. Section 212 (d) (5) does not purport to confer on excluded aliens the benefits which Congress, in Section 243 (h), conferred on aliens who, unlike petitioner, are actual residents of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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